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July 25, 2005

Ms. Blanca S. Bayó, Director  
Division of the Commission Clerk  
& Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: Docket No. 041464-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint-Florida, Incorporated is Sprint's Response to FDN's Omnibus Motion for Reconsideration of Prehearing Officer's July 8, 2005 Order, or in the Alternative, Motion to Revise Schedule Pursuant to the July 8 Order.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions, please do not hesitate to call me at 850/599-1560.

Sincerely,

A handwritten signature in black ink that reads "Susan S. Masterton". The signature is written in a cursive, slightly slanted style.

Susan S. Masterton

Enclosure

**CERTIFICATE OF SERVICE  
DOCKET NO. 041464-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. mail on this 25<sup>th</sup> day of July, 2005 to the following:

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Susan S. Masterton

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition of Sprint-Florida, Inc. for	)	
Arbitration of an Interconnection Agreement	)	Docket No. 041464-TP
with Florida Digital Network, Inc. Pursuant to	)	
Section 252 of the Telecommunications	)	Filed: July 25, 2005
Act of 1996	)	
_____	)	

**SPRINT'S RESPONSE TO FDN'S OMNIBUS MOTION FOR  
RECONSIDERATION OF THE PREHEARING OFFICER'S JULY 8, 2005  
ORDER; OR, IN THE ALTERNATIVE, MOTION TO REVISE SCHEDULE  
PURSUANT TO THE JULY 8 ORDER**

Pursuant to Rule 25-22.0376, F.A.C., Sprint-Florida, Incorporated (hereinafter "Sprint") hereby files its Response to FDN's "Omnibus" Motion for Reconsideration of the Prehearing Officer's July 8, 2005 Order; or, in the Alternative, Motion to Revise Schedule Pursuant to the July 8 Order. The Motion was filed by FDN on July 18, 2005 and served on Sprint via electronic mail.

FDN's sweeping Motion makes several specious allegations regarding the foundation of the Prehearing Officer's ruling on FDN's Motion for Postponement and Sprint's Response and Motion to Strike, as set forth in Order No. PSC-05-0732-PCO-TP, and the facts applicable to the UNE issue in dispute between the parties. These erroneous and unsubstantiated allegations fail to meet the standard for reconsideration long embodied in Florida law and consistently applied by the Commission. FDN also purports to file a "new" Alternative Motion to revise the procedural schedule in this docket to reflect the Prehearing Officer's Order. While FDN couches this as a "new" motion, rather than a Motion for Reconsideration, it is in effect a request to reconsider the Prehearing Officer's denial of FDN's Motion for Postponement and is, therefore, a Motion for

Reconsideration of the Prehearing Officer's Order. FDN's Motion(s) for Reconsideration of Order No. PSC-05-0732-PCO-TP fails to meet the standard for a Motion for Reconsideration, is based on flawed premises and unproven factual speculations, therefore, should be denied.

### **Standard Of Review**

As the Commission has recognized consistently in its rulings on Motions for Reconsideration, whether they are requests to reconsider final or interim rulings, the standard for granting a Motion for Reconsideration is that the Motion must identify some point of fact or law that the Commission (or Prehearing Officer) overlooked or failed to consider in rendering its Order. See, *Stewart Bonded Warehouse v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond King Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); and *Pingree v. Quaintance*, 394 So. 2d 162 (Fla. 1<sup>st</sup> DCA 1981).<sup>1</sup> The Commission has held that it is not a sufficient basis for a Motion for Reconsideration that the movant merely believes that a mistake was made (*Steward Bonded Warehouse* at 317) nor is it appropriate for the movant to reargue the same points of fact or law that were considered in the original ruling. See, *State ex.rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1<sup>st</sup> DCA 1958).

### **FDN's Motion for Reconsideration of the Ruling on the Motion to Strike Fails To Meet The Standard For Reconsideration**

FDN's Motion seeks reconsideration of the prehearing officer's ruling granting Sprint's Motion to Strike on that basis that it is inappropriate for FDN to revisit the cost studies underlying the UNE rates approved for Sprint by the Commission in the generic

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<sup>1</sup> Mysteriously, FDN inserts the word "policy" in its iteration of the applicable standard for reconsideration. In reading the cases cited by FDN as well as several other reconsideration orders issued by the Commission, Sprint could find no instance in which the Commission included a mistaken or overlooked point of "policy" as a basis for a Motion for Reconsideration.

UNE docket.<sup>2</sup> FDN's Motion fails to meet the standards for reconsideration discussed above. Rather, the primary basis of FDN's Motion appears to be a misunderstanding of the Prehearing Officer's ruling concerning the scope and applicability of the Sprint UNE Order. Contrary to FDN's assertion on page 2 of its Motion, the Prehearing Officer did not address in his ruling whether UNE rates could be adopted only in a generic proceeding. Rather, he emphasized that Sprint's UNE rates at issue in this proceeding were properly adopted in a generic proceeding in which FDN intervened and participated as full party. (Order at page 3) Because FDN was a party to the generic proceeding and because FDN never questioned the propriety of a generic docket to establish Sprint's UNE rates in that docket, the Prehearing Officer ruled that FDN could not relitigate the same cost studies and UNE rates in this arbitration. (Order at 3) In rendering his decision, the Prehearing Officer considered the same arguments (made by FDN in its original Motion for Postponement and its Response to Sprint's Motion to Strike) that FDN makes in its Motion for Reconsideration. In all of these pleadings FDN argues that section 252 of the federal Telecommunications Act gives FDN the absolute right to re-litigate in an arbitration UNE rates approved by a state commission in a generic proceeding. (FDN Motion for Postponement at page paragraph 5, footnote 6, FDN Response to Sprint's Motion to Strike at paragraph 2 and FDN Motion for Reconsideration at pages 3 and 4) The Prehearing Officer properly rejected FDN's arguments, finding instead that the generic proceeding to establish Sprint's UNE rates was proper and that the appropriate avenue for FDN to challenge the Sprint UNE Order is through its pending federal court appeal (Order at page 3)

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<sup>2</sup>*In re: investigation into pricing of unbundled network elements (Sprint/Verizon track)*, Order No. PSC-03-0058-FOF-TP in Docket No. 990649B-TP, issued January x, 2003. ("Sprint UNE Order")

Section 252 and existing precedent support the Prehearing Officer's ruling that the generic proceeding was an appropriate mechanism for setting UNE rates. Section 252(g) provides that "Where not inconsistent with the requirements of this Act, a state commission may, to the extent practical, consolidate proceedings under section 214(e), 251(f), 253 and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State Commission in carrying out its responsibilities under this Act." This provision has been interpreted to authorize generic proceedings to establish UNE rates. See, *Quest v. Koppendayer*, 2004 U.S. Dist. LEXIS 6064 (U.S. Dist. Ct. for Minnesota). In fact, the Sprint UNE Order provides that the rates are effective when incorporated through an amendment to an existing interconnection agreement or into a new interconnection agreement. (Sprint UNE Order at page 204) If a party who was not satisfied with the outcome of a generic proceeding had the absolute right to re-litigate the issues in an arbitration, then the purpose of generic proceedings would be nullified.

FDN also incorrectly characterizes the scope of the issue disputed by the parties during the course of the negotiations and as set forth by Sprint in its Petition for Arbitration and FDN's Response. (FDN Motion at page 4) Sprint has always made clear from the onset of the arbitration and before, that its position was that the Sprint's UNE rates approved by the Commission were the appropriate UNE rates to be incorporated in the agreement. (See, Sprint's Petition for Arbitration filed December 30, 2004 at paragraphs 16 and 19) Similarly, FDN has made clear its refusal to incorporate those rates, instead insisting that it should be able to continue to purchase UNEs under the rates in its expired agreement. (See, FDN's Response to Sprint's Petition for Arbitration filed

January 24, 2005 at paragraph 19, where FDN agrees that Sprint has appropriately described the UNE rate issue. In the Issues List attached to FDN's Response, Sprint could find no issue relating to a reopening of the UNE rates established in the Sprint UNE Order.)

The basis for FDN's refusal to accept the Commission-approved Sprint UNE rates has been its pending federal appeal of the UNE rates. FDN has maintained this position even though, under the law, the rates are in effect since they have not been stayed by the court or the Commission. FDN has never expressed a desire to revisit the rates for any other reason than that it was unhappy with the Sprint UNE Order and with the Commission's ruling on FDN's Motion for Reconsideration of that Order. In fact, in its Motion for Reconsideration FDN essentially admits that it is attempting to re-litigate the issues in the UNE docket when it states on page 6 of its Motion "While FDN did not agree with the Commission's conclusions in that case, FDN is striving in this proceeding to provide the Commission with a complete record so that appropriate adjustments may be made to Sprint's model and the resulting UNE rates." The Prehearing Officer correctly ruled that the issues FDN has raised concerning Sprint's UNE rates are properly addressed via the federal court appeal, not through relitigation of the cost study and rates in this arbitration. (Order at page 3)

As a result of its misunderstanding of the intent of the Prehearing Officer's ruling, FDN incorrectly characterizes the Order as creating a "secret rule." (FDN Motion at pages 5 and 6) While Sprint disagrees that the Order intended to make a blanket pronouncement that UNE rates always must be established in a generic proceeding, Sprint notes that FDN's analysis of the applicable law relating to rulemaking fails to take

into account s. 120.80(13)(d), Florida Statutes, which authorizes the Commission to deviate from the procedures outlined in chapter 120, F.S., to implement its responsibilities under the Telecommunications Act. Since the Commission's generic procedures to establish UNE rates are consistent with the Act, as discussed above, then they are permissible pursuant to s. 120.80(13)(d), F.S.

The Prehearing Officer properly characterized the effect of the Sprint UNE Order on the UNE rate issue in dispute in this arbitration. FDN has identified no point of fact or law that the Prehearing Officer overlooked or failed to consider. Therefore, FDN's Motion for Reconsideration of the Prehearing Officer's Order on this point should be denied.

**FDN's Motion for Reconsideration of the Order Denying FDN's Motion for Postponement Fails to Meet the Standard for Reconsideration**

In the event its Motion for Reconsideration concerning the scope of the UNE rate issue in the arbitration fails, FDN persists in its efforts to reconsider the procedural schedule in order to delay the arbitration.<sup>3</sup> While FDN attempts to couch this request as an "alternative" motion, in reality it is a request to reconsider the Prehearing Officer's denial of FDN's Motion for Postponement in Order No. PSC-05-0732-FOF-TP. This maneuver reveals the true motivation behind FDN's pleadings. It is the same motivation that has propelled FDN to: first, refuse to negotiate an amendment to its prior agreement to reflect the Commission ordered rates; second, refuse to incorporate the new rates into the parties' follow on agreement; third, attempt to initially delay the resolution of this arbitration on the basis that the parties needed more time to negotiate various unrelated

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<sup>3</sup> In its Motion, FDN apparently also seeks a ruling on its Motion to Compel relating to Sprint's responses to FDN's first set of discovery. (Motion for Reconsideration at pages 8 and 10) The Prehearing Officer has already ruled on the Motion to Compel. Therefore, the proper avenue for FDN to address these issues is through a Motion for Reconsideration of that Order.



issues; fourth, file its original Motion for Postponement on the basis that it needed time to reanalyze the cost studies filed by Sprint in Docket No. 990649B; and, finally, assert that it needs more time to come up with new arguments to dispute Sprint's rates now that its original arguments have been stricken. FDN's request for postponement is a sham, asserted solely for the purpose of delay. FDN's continued attempts to relitigate the same arguments, despite the Commission's consistent rulings against FDN are an abuse of process and should, once again, be rejected.<sup>4</sup>

FDN's Alternative Motion also fails to meet the applicable standard for reconsideration in that FDN identifies no point of fact or law the Prehearing Officer overlooked or failed to consider in confirming the current procedural schedule. No additional time is necessary to decide whether the UNE rates approved for Sprint in the generic UNE docket should be incorporated into the Sprint/FDN agreement. To support its Motion, FDN throws out several hypotheses that, in addition to being entirely speculative, have not been raised in this proceeding previously, either in FDN's pre-filed testimony or in the previous Motions or Responses filed by FDN. Not only have these purported "facts" not been raised previously, in some cases they are patently false. For instance on page 9 of its Motion FDN states that "the intensity and range of competition in the telecommunications industry has drastically declined since 2001, which was probably the peak year of the telecom 'boom' before the bust." While competition in the form of CLECs using ILEC facilities to compete may, as FDN alleges, have decreased since 2001, competition from providers using their own facilities has substantially increased, i.e., competition from wireless, cable and VoIP providers. In reality, access

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<sup>4</sup> In addition to its pleadings in this docket, FDN unsuccessfully has asserted these same positions in several pleadings in Docket No. 990649B-TP, as well as in its pending federal appeal. See, Sprint's Response to FDN's Motion for Postponement and Motion to Strike at paragraphs 11-17.

lines for ILECs are predicted to decline at a steady pace due to the inroads made by these intermodal facilities-based providers.

FDN points to a petition filed by Verizon Communications to revisit certain aspects of the Verizon UNE rates approved by the Commission in Docket No. 990649B-TP in support of its Motion.<sup>5</sup> That docket involved a petition for a generic proceeding to revisit the cost of capital and depreciation factors used in the establishment of Verizon's Commission-approved rates because of FCC orders issued subsequent to the Commission's decision. The Commission voted to go to hearing on the issues raised by Verizon, but cautioned that all of the UNE rates would be open to examination, not just the narrow issues raised by Verizon. The Commission's decision in the Verizon case does not support FDN's attempt to re-litigate piecemeal the issues it lost in the generic UNE docket, rather it supports Sprint's position that, if Sprint's UNE rates are to be reopened, then Sprint is entitled to file an entirely new cost study for all of the rates, rather than just revisiting on recycled grounds the previously filed cost studies. In any event, on July 17, 2005 Verizon withdrew its Petition and asked the Commission to close the docket. If the Commission determined that Sprint's UNE rates should be reopened, Sprint suggests that the appropriate mechanism would be a generic proceeding in which all affected parties could participate. In that event, there is no reason to delay this arbitration proceeding. Rather, the Commission should resolve the arbitration issues, including the UNE rate issue, and provide that the applicable rates may be superseded by any rates subsequently approved by the Commission.

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<sup>5</sup> See, Docket No. 050059-TL, *In re: Petition of Verizon Florida, Inc. to reform UNE cost of capital and depreciation inputs to comply with the FCC's guidance in the Triennial Review Order*. In that proceeding, FDN appears to have taken a position opposing Verizon's request to revise its UNE rates. See, June 21, 2005 Agenda Conference Transcript for Item No. 8.

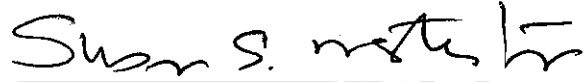
FDN's Alternative Motion to Postpone (i.e., its Motion to Reconsider the Prehearing Officer's denial of its Motion for Postponement) is clearly just another attempt by FDN to delay the implementation of Sprint's Commission-approved UNE rates. The Motion does not identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in denying FDN's request for postponement. The new factual allegations it introduces to support its Motion are procedurally improper and, in many cases, patently false. FDN's Motion as it relates to a request for postponement of the arbitration proceeding should be denied.

### CONCLUSION

FDN continues to avail itself of every possible procedural ploy to delay implementation of the UNE rates approved for Sprint in the Sprint UNE Order. This Motion for Reconsideration of the Prehearing Officer's Order Granting Sprint's Motion to Strike and Denying FDN's Motion for Postponement is just one other in a long line of similar filings. Sprint believes that the Prehearing Officer's rulings granting Sprint's Motion to Strike and Denying FDN's Motion for Postponement are correct. FDN has identified no point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering his decision. Therefore, FDN's Omnibus Motion for Reconsideration of the Prehearing Officer's July 8, 2005 Order; or, in the Alternative Motion to Revise Schedule Pursuant to the July 8 Order should be denied in its entirety. However, should the Commission decide to reopen Sprint's UNE rates, Sprint asserts that the rates should be reconsidered in their entirety (not just in a piecemeal relitigation of previously approved cost studies as FDN suggests). During the pendency of this proceeding, the Commission should resolve the issues in this arbitration under the current

schedule and should order that the Commission-approved UNE rates for Sprint be incorporated into Sprint's agreement with FDN until new UNE rates, if any, are approved by the Commission.

Respectfully submitted this 25<sup>th</sup> day of July 2005.



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